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# Prosecuting Worker Endangerment: The Need for Stronger Criminal Penalties for Violations of the Occupational Safety and Health Act

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David M. Uhlmann\*

A recent spate of construction deaths in New York City, similar incidents in Las Vegas, and scores of fatalities in recent years at mines and industrial facilities across the country have highlighted the need for greater commitment to worker safety in the United States and stronger penalties for violators of the worker safety laws. Approximately 6,000 workers are killed on the job each year<sup>1</sup>—and thousands more suffer grievous injuries—yet penalties for worker safety violations remain appallingly small, and criminal prosecutions are almost non-existent.

In recent years, most of the criminal prosecutions for worker safety violations have been brought by the Justice Department's Environmental Crimes Section, which began a worker endangerment initiative in 2005 to highlight the fact that environmental crimes frequently place America's workers at risk of death or serious bodily injury, and to prosecute companies that systematically violate both the environmental laws and the worker safety laws.<sup>2</sup>

The Justice Department's worker endangerment initiative has produced a number of high-profile prosecutions involving companies such as BP Products North America, McWane, Inc., Motiva Enterprises, LLC, and W.R. Grace & Co. The worker endangerment initiative has focused on companies that allowed profits to take precedence over compliance with the law and treated workers as if they were expendable. Criminal

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<sup>1</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS, 1992-2006, (rev. 2008). From 1992 to 2006, workplace deaths ranged from a high of 6,632 in 1994 to a low of 5,534 in 2002. During 2006, the last year for which data currently is available, 5,840 work-related fatalities were reported to the Department of Labor.

<sup>2</sup> David Barstow & Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws*, N.Y. TIMES, May 2, 2005, at A17. See also Daniel Reisel & Dan Chorost, *When Regulatory Universes Collide: Environmental Regulation in the Workplace*, 13 N.Y.U. ENVTL L.J. 613, 638-643 (2005).

prosecution of those companies protects American workers, upholds the rule of law, and ensures that corporate violators do not have a competitive advantage over companies that make compliance a priority.

The success of the Justice Department's worker endangerment initiative, however, has highlighted the inadequacy of the criminal provisions of our worker safety laws. Most of the cases brought by the Environmental Crimes Section charged violations of the endangerment provisions of the environmental protection statutes<sup>3</sup> and the general criminal provisions of Title 18 of the United States Code, which makes it a crime to make false statements,<sup>4</sup> obstruct justice,<sup>5</sup> and commit conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs.<sup>6</sup> Typically, the crimes charged were felonies, punishable by up to 15 years in jail for knowing endangerment and 20 years in jail for some forms of obstruction of justice.

Only one case brought to date under the worker endangerment initiative, the prosecution of McWane for a worker death at its Union Foundry plant, has utilized the criminal provisions of the Occupational Safety and Health Act (the "OSH Act").<sup>7</sup> Prosecution under the OSH Act is rare, because the only substantive criminal provision of the Act is limited to (1) willful violations of worker safety regulations that (2) result in worker death. Even if a willful violation causes death, the crime is only a Class B misdemeanor, with a maximum sentence of six months in jail.<sup>8</sup>

The criminal provisions of our worker safety laws are so weak that they do little to protect America's workers. Misdemeanor violations provide little deterrence and minimal incentive for prosecutors and law enforcement personnel, who reserve their limited resources for the crimes that Congress has deemed most egregious by making them felonies (with significant maximum penalties). Focusing exclusively on violations involving worker deaths ignores the pain and anguish that results from serious injuries, which also may warrant criminal remedies. Limiting prosecution to willful violations may make ignorance of the law a defense, contrary to the time-honored maxim of American jurisprudence that ignorance of the law is not a defense. Finally, only "employers" can be prosecuted for criminal violations of the OSH Act, which means that the mid-level managers who have the greatest day-to-day responsibility for unsafe working conditions often are immune from criminal prosecution under the Act.

This Issue Brief argues that Congress should pass legislation to strengthen the criminal provisions of the OSH Act early in the next Administration. First, the article describes one of the cases that led to the Justice Department's worker endangerment initiative and exposed the inadequacy of the criminal provisions of our worker safety laws. Second, the article explains why a stronger criminal program under the OSH Act would promote greater compliance with our worker safety laws. Third, the article

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<sup>3</sup> See, e.g., 33 U.S.C. § 1319(c)(3) (knowing endangerment under the Clean Water Act); 42 U.S.C. § 6928(e) (knowing endangerment under the Resource Conservation and Recovery Act); 42 U.S.C. § 7413(c) (4) (negligent endangerment under the Clean Air Act); and 42 U.S.C. § 7413(c)(5) (knowing endangerment under the Clean Air Act).

<sup>4</sup> 18 U.S.C. § 1001.

<sup>5</sup> 18 U.S.C. §§ 1503, 1505, 1512 & 1519.

<sup>6</sup> 18 U.S.C. § 371.

<sup>7</sup> 29 U.S.C. § 666(e). McWane pleaded guilty in September 2005 to an information charging that willful violations of the OSH Act caused the death of one of its employees. The federal district court imposed a \$4.25 million fine on McWane. This case is discussed in more detail in Sec. II of this article.

<sup>8</sup> The OSH Act also criminalizes giving advanced notice of an inspection and making false statements in records or documents required under the Act. See 29 U.S.C. § 666(f) (advanced notice of inspections) and 29 U.S.C. § 666(g) (false statements). Both are Class B misdemeanors.

recommends changes to the criminal provisions of the OSH Act that would provide a more effective criminal enforcement scheme.

## I. THE CYANIDE CANARY<sup>9</sup>

In August 1996, Scott Dominguez collapsed and nearly died inside a 25,000 gallon steel storage tank while working at Evergreen Resources, a fertilizer manufacturing facility in Soda Springs, Idaho. The owner of Evergreen Resources was Allan Elias, a Wharton graduate and attorney who had a long history of environmental and worker safety violations. Elias previously used the 25,000 gallon tank for a cyanide leaching operation and to store phosphoric acid. Cyanide and phosphoric acid react to form deadly hydrogen cyanide gas; expert testimony at trial established that there was enough cyanide in the storage tank to kill thousands of people.<sup>10</sup>

Elias nonetheless ordered Dominguez and his co-workers to clean out the cyanide-laced sludge from the bottom of the tank. Elias ignored the pleas of his workers for safety equipment and for tests to determine whether it was safe to go inside the tank. Elias refused to prepare a “confined space entry permit” that was required under OSH Act regulations.<sup>11</sup> Elias ordered his workers to conduct the tank-cleaning operation even though he had been warned for years by the Occupational Safety and Health Administration (“OSHA”) about the dangers of sending workers into confined spaces like the tank without safety equipment and appropriate testing. When the workers complained of sore throats and difficulty breathing, Elias told them he would see if he could locate safety equipment, but directed them to continue the tank-cleaning project in the interim.

Dominguez, a recent high school graduate without significant work experience, felt like he did not have any choice. Wearing just jeans and a t-shirt, Dominguez used a ladder to climb to the top of the tank, and then used the same ladder to enter the tank through a 22-inch wide manhole on the top of the tank. Within an hour, Dominguez had collapsed. He could not be rescued for 45 minutes, after firefighters donned protective gear, tested the air for explosives, and cut a hole in the side of the tank. By then, Dominguez was comatose and non-responsive.

In the frantic minutes before paramedics rescued Dominguez, firefighters asked Elias whether there was anything in the tank that could explain what had happened to Dominguez or put the rescuers at risk. Elias lied and said there was nothing but mud inside the tank. After the ambulance rushed Dominguez to the hospital, the emergency room doctor, John Wayne Obray, called Elias twice to ask what was inside the tank. On the second call, Dr. Obray asked Elias whether there was any possibility that cyanide was in the tank. Elias lied again and said no.

The next day OSHA inspectors interviewed Elias, who falsely represented that he had a confined space entry permit for the tank cleaning operation. Later that

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<sup>9</sup> Joseph Hildorfer & Robert Dugoni, *THE CYANIDE CANARY: A STORY OF INJUSTICE* (2004). Former EPA Special Agent Hildorfer and co-author Dugoni provide a first-hand account of the prosecution of *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), for environmental crimes that left the victim permanently brain-damaged. Multiple worker safety violations occurred, but no worker safety crime, because of the deficiencies of the OSH Act. The description of the case provided in this article, unless otherwise noted, is based on the background in the Ninth Circuit opinion, 269 F.3d at 1007-1008, and the author’s recollection from his role as one of the lead prosecutors.

<sup>10</sup> Trial Transcript at 3320 (Testimony of Dr. Joe Lowry), *United States v. Allan Elias*, CR No. 98-00070-E-BLW (D. Idaho May 3, 1999).

<sup>11</sup> 29 C.F.R. § 1910.146. A confined space entry permit would have detailed the steps that were being taken to protect the workers and enable them to be rescued if someone were injured.

morning, Elias went to a neighboring facility operated by Kerr McGee Chemical Corporation and borrowed a safety manual, which included instructions about how to prepare a confined space entry permit. He then prepared and backdated a confined space entry permit for the tank cleaning operation and submitted the false permit to OSHA, claiming it had been prepared before Dominguez was hurt.

The United States charged Elias with three felony counts under the environmental laws, including knowing endangerment under the Resource Conservation and Recovery Act ("RCRA"), which carries a maximum penalty of 15 years in prison. In addition, the United States charged Elias with one felony count under Title 18 of the United States Code for submitting the fabricated confined space entry permit to OSHA.<sup>12</sup>

During the 3½-week trial, expert witnesses testified that Elias had committed egregious violations of the OSH Act and that his actions had placed Dominguez and others in imminent danger of death or serious bodily injury.<sup>13</sup> OSHA inspectors testified about earlier inspections and how they had warned Elias about the dangers associated with confined space entries.<sup>14</sup> Dominguez testified that he did not know there was cyanide in the tank, and that he entered the tank without safety equipment because "I really, really, really did, really did trust Allan."<sup>15</sup>

After less than six hours of deliberations, the jury convicted Elias on all counts on May 7, 1999. United States District Court Judge B. Lynn Winmill sentenced Elias to 17 years in prison, which until recently was the longest sentence ever imposed for an environmental crime.

The Justice Department hailed the Elias conviction and the resulting sentence, because it demonstrated that "environmental crimes are real crimes, and that those who flout our environmental laws will go to prison for a long time."<sup>16</sup> The proof of knowing endangerment in the Elias case, however, was based as much upon evidence that Elias violated OSHA regulations governing confined space entries as it was on the unpermitted disposal of hazardous waste in violation of RCRA. Indeed, the case was a worker safety case as much as it was an environmental case.

Yet Elias did not commit a criminal violation of the worker safety laws. Elias did not commit a worker safety crime, even though OSHA cited Elias for willful violations of worker safety regulations and even though the jury found unanimously that Elias knew he was placing his workers in imminent danger of death or serious bodily injury. Elias did not commit a worker safety crime, because Dominguez, although he was permanently brain-damaged, did not die.

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<sup>12</sup> The United States charged the falsified permit as a violation of 18 U.S.C. § 1001, instead of the OSH Act's false statement provision, 29 U.S.C. § 666(g), because a false statement under Title 18 is a felony punishable by up to five years in jail. Elias was convicted and sentenced to the statutory maximum penalty of five years on the Title 18 false statement charge. A fifth and unrelated count, charging the illegal disposal of hazardous treater dust in violation of RCRA, was dismissed without prejudice at the government's request prior to the trial.

<sup>13</sup> Trial Transcript at 2353-2354, 2360 (Testimony of Gregory Boothe, Apr. 27, 1999) and 3522-3523 (Testimony of Dr. Daniel Teitelbaum, May 4, 1999), *United States v. Allan Elias*, *supra* note 10.

<sup>14</sup> Trial Transcript at 2012-2034 (Testimony of David Mahlum, April. 26, 1999), *United States v. Allan Elias*, *supra* note 10.

<sup>15</sup> Trial Transcript at 3499 (Testimony of Scott Dominguez, May 3, 1999), *United States v. Allan Elias*, *supra* note 10.

<sup>16</sup> Press Release, Office of Public Affairs, U.S. Dep't of Justice, Idaho Man Given Longest-Ever Sentence for Environmental Crime (Apr. 29, 2000) (Statement of Assistant Attorney General for the Environment and Natural Resources Division Lois J. Schiffer).

Elias committed egregious crimes and deserved the 17-year prison sentence imposed by Judge Winmill. The Elias case provides a stark contrast, however, between the strength of the criminal provisions of the environmental laws and the weakness of the criminal provisions of the worker safety laws. It is appropriate that endangering workers during a hazardous waste violation carries a 15 year maximum sentence per count; it is illogical that the same conduct during a worker safety violation is not a crime unless a worker dies—and even then is only a six-month misdemeanor per count.

Nor are the criminal provisions of the environmental laws an effective antidote for the weakness of the criminal provisions of the worker safety laws. Most environmental crime occurs in a workplace setting and involves the mishandling of hazardous substances or pollutants, which can place workers at risk. However, many cases involving danger to workers cannot be prosecuted under the environmental laws, because they do not involve mishandling of hazardous wastes, or unlawful releases of hazardous air pollutants into the ambient air, or illegal discharges of pollutants into waters of the United States. Relying on the environmental laws to protect America's workers means that, in many cases, America's workers will be unprotected.<sup>17</sup>

Moreover, even when environmental laws apply, their enforcement can raise complicated regulatory issues. Elias challenged his convictions on the grounds that the applicable definition of hazardous waste was too vague to be criminally enforced. He also raised jurisdictional issues post-trial that nearly resulted in the dismissal of several of the charges. While the Ninth Circuit did not agree with Elias,<sup>18</sup> his ability to make such arguments shows the limits of environmental criminal enforcement as the primary method of addressing worker endangerment cases.

## II. THE NEED FOR A STRONG CRIMINAL PROGRAM

Most companies in the United States comply with the law and care about protecting their workers. For those companies, worker safety is more than a legal requirement; it is a moral obligation. But experience teaches that there always will be companies that take a different approach, companies with owners like Allan Elias who think that the law does not apply to them or that, if they get caught, they can either avoid penalties or simply pay a modest fine.

Sadly, under the existing OSH Act, the companies that think there are not significant penalties for violating OSHA regulations probably are correct. Willful or repeated violations carry a maximum administrative penalty of \$70,000 per violation, a number which has not been increased in nearly two decades<sup>19</sup> and pales in comparison to the cost of an effective compliance program.

Criminal penalties can be much higher than administrative penalties under the OSH Act, because Title 18 sets a maximum penalty of \$500,000 for misdemeanors that are committed by organizational defendants and result in death<sup>20</sup> or twice the

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<sup>17</sup> See Lynn K. Rhinehart, *Would Workers Be Better Protected If They Were Declared an Endangered Species? A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws*, 31 AM. CRIM. L. REV. 351, 362-373 (1994); Robert G. Schwartz, Jr., *Criminalizing Occupational Safety Violations: The Use of "Knowing Endangerment" Statutes to Punish Employers Who Maintain Toxic Working Conditions*, 14 HARV. ENVTL L. REV. 487, 508 (1990).

<sup>18</sup> *Elias*, 269 F.3d at 1009-13 (jurisdictional issues) and 1014-17 (regulatory vagueness claims).

<sup>19</sup> 29 U.S.C. § 666(a). The penalty for willful violations was increased from \$10,000 to \$70,000 in 1990. Pub. L. 101-508, 104 Stat. 1388.

<sup>20</sup> 18 U.S.C. § 3571(c)(4).

gain or loss associated with the offense (whichever is greater).<sup>21</sup> As discussed above, however, the substantive criminal provision of the OSH Act applies only if a willful violation results in worker death. Moreover, even if the criminal provisions apply, most United States Attorney's Offices—faced with the challenge of prosecuting cases across a wide range of federal regulatory programs, in addition to drug and gun crimes—focus on felony cases and do not devote their limited prosecutorial resources to misdemeanor cases involving regulatory crime.<sup>22</sup>

The net result is a worker safety program in which most violators—even willful violators—will face only administrative violations and relatively modest penalties if they are cited.<sup>23</sup> That makes it easy for companies to put profits before compliance and to view any penalties that may result as a cost of doing business. A company that epitomized that approach was McWane.

McWane is a privately owned company that operates pipe manufacturing facilities across the United States. Although pipe manufacturing is inherently dangerous, because it involves heavy equipment and the melting of steel at extremely high temperatures, McWane facilities were particularly hazardous places to work. From 1995 to 2003, at least 4,600 workers were injured at McWane plants,<sup>24</sup> giving McWane one of the worst safety records in the United States.

Yet, despite McWane's alarming record of worker injuries and deaths, the company's only criminal conviction prior to 2005 was a single misdemeanor count in July 2002 under the OSH Act for willful violations of the worker safety laws. These violations resulted in a worker being crushed to death at McWane's Tyler Pipe facility in Tyler, Texas. McWane paid a fine of \$250,000.

In January 2003, as a pilot project for the worker endangerment initiative, the Justice Department and the United States Environmental Protection Agency ("EPA") began a criminal investigation of environmental and worker safety violations at five McWane facilities: Atlantic States Cast Iron Pipe Company in New Jersey; McWane Cast Iron Pipe Company in Alabama; Pacific States Cast Iron Pipe Company in Utah; Tyler Pipe in Texas; and Union Foundry in Alabama. The investigations revealed a company that was a persistent violator of worker safety and environmental laws, and which made it a practice to lie to OSHA inspectors and federal and state environmental officials to conceal its illegal activity.

<sup>21</sup> 18 U.S.C. § 3571(d).

<sup>22</sup> See David M. Uhlmann, *The Working Wounded*, N.Y. TIMES, May 27, 2008, at A23 ("In the 38 years since Congress enacted the Occupational Safety and Health Act, only 68 criminal cases have been prosecuted, or less than two per year, with defendants serving a total of just 42 months in jail. During that same time period, approximately 341,000 people have died at work, according to data compiled from the National Safety Council and the Bureau of Labor Statistics by the AFL-CIO."); see also When a Worker is Killed: Do OSHA Penalties Enhance Workplace Safety?: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions, 110th Cong. 8 (2008) (testimony of Peg Seminario, Director of Safety and Health, AFL-CIO).

<sup>23</sup> There is evidence that OSHA has begun taking a more aggressive approach to administrative penalties, notwithstanding the limits of the OSH Act's penalty scheme. On July 25, 2008, OSHA announced that it would seek \$8.7 million in administrative penalties against Imperial Sugar for violations that resulted in 14 deaths at a Georgia refinery. See Shaila Dewan, *OSHA Seeks \$8.7 Million Fine Against Sugar Company*, N.Y. TIMES, July 26, 2008, at A11 (since the article was written a fourteenth worker died as a result of injuries at the refinery). Average penalties, however, remain alarmingly low. According to a recent Senate Committee report, the median penalty imposed by OSHA for fatality cases was \$3,675 during fiscal year 2007. MAJORITY STAFF OF S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 110TH CONG., DISCOUNTING DEATH: OSHA'S FAILURE TO PUNISH SAFETY VIOLATIONS THAT KILL WORKERS 5 (2008).

<sup>24</sup> David Barstow & Lowell Bergman, *A Dangerous Business: At a Texas Foundry, an Indifference to Life*, N.Y. TIMES, Jan. 8, 2003, A1.

McWane eventually pleaded guilty in September 2005 to criminal charges under the OSH Act at its Union Foundry facility, and received a criminal sentence of \$4.25 million.<sup>25</sup> McWane also pleaded guilty to Clean Air Act crimes at Pacific States, with a criminal sentence of \$3 million, and at Tyler Pipe, with a criminal sentence of \$4.5 million. McWane challenged the charges for violations committed at its Atlantic States and McWane Cast Iron Pipe facilities, where multiple McWane officials were indicted. After lengthy trials, McWane and most of the individual defendants were convicted, although the cases are still pending.<sup>26</sup>

While the criminal cases against McWane have not ended, the multi-million dollar criminal fines imposed against McWane and the years of adverse publicity resulting from the criminal investigations and prosecutions may have changed McWane's approach to worker safety. In a follow-up piece to the exposé that launched the McWane investigations,<sup>27</sup> *Frontline* interviewed dozens of McWane employees who describe a "new McWane" where worker safety and environmental compliance are now a priority. Former OSHA Administrators and senior Justice Department officials now advise McWane about its regulatory compliance programs.

Only time will tell whether there is a new corporate attitude at McWane. It is revealing, however, that the company ignored worker safety in the face of years of worker injuries and deaths, and accompanying administrative penalty actions (and a single criminal conviction with a modest fine). McWane only began to make changes when the United States launched a concerted, national investigation and prosecution effort, with multiple indictments for felony violations and multi-million dollar criminal penalties for those crimes. The McWane prosecutions therefore speak volumes about the role of a strong criminal program in promoting worker safety and compliance.

A strong criminal program, particularly one where individual corporate officials may face significant jail time if they commit criminal violations, sends a message to the regulated community about the need to make compliance with worker safety laws a priority. Companies that do not care about worker safety for its own sake will pay far more attention to worker protection if they fear criminal sanctions and possible jail time for their corporate officials.

Criminal enforcement also provides benefits beyond punishment and deterrence of criminal activity. In regulatory programs where there is a credible criminal enforcement threat, companies are quicker to resolve administrative penalty actions and respond more productively to regulatory inspections. The OSHA inspectors trained as part of the Justice Department's worker endangerment initiative describe many companies that are indifferent or hostile to OSHA compliance officers. That would not be the case if the OSHA enforcement scheme included a more significant criminal enforcement threat than the current OSH Act provides.

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<sup>25</sup> The federal district court imposed a substantial fine in the Union Foundry case because McWane agreed to be sentenced under the loss-doubling provisions of the Alternative Fines Act, 18 U.S.C. § 3571(d), with the fine calculated based on what a wrongful death award might have been in a civil case. In a contested sentencing proceeding, however, that approach might not be successful, which underscores the need for the OSH Act to provide larger criminal penalties.

<sup>26</sup> Sentencing in the Atlantic States case has not occurred more than two years after the completion of the trial, which lasted seven months and was the longest environmental crimes trial ever in the United States. A new trial may be necessary in the McWane Cast Iron Pipe case after the United States Court of Appeals for the Eleventh Circuit reversed the convictions on Clean Water Act jurisdictional grounds, *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *reh'g en banc denied*, 521 F.3d 1319 (2008). In August, 2008, the United States petitioned the Supreme Court for review of the Eleventh Circuit's decision.

<sup>27</sup> *Frontline: A dangerous Business Revisited* (PBS television broadcast Feb. 5, 2008).



Companies that make worker safety a priority should not feel threatened by a stronger criminal enforcement program. Stronger criminal provisions would not be used to criminalize accidents, which can happen despite the best efforts of employers and employees. Criminal enforcement would occur only in situations involving knowing conduct that violated a worker safety requirement. As a practical matter, only companies that routinely violate worker safety laws would be at risk. Those companies should not have a competitive advantage over companies that devote the necessary resources to worker safety. We want companies that are chronic violators to be worried about criminal prosecution, so that they are more likely to comply with the law.

### III. RECOMMENDATIONS FOR STRENGTHENING THE CRIMINAL PROVISIONS OF THE OSH ACT

The criminal provisions of the OSH Act should be strengthened to reflect the Act's emphasis on public health and safety, to provide the credible criminal deterrent that is needed to ensure greater compliance with worker safety laws, and to provide consistency with other federal regulatory crimes. New legislation should (1) make criminal violations of the Act felonies and provide enhanced penalties for violators; (2) expand the criminal provisions to include cases involving serious bodily injury and knowing endangerment; (3) modify the mental state requirements so that ignorance of the law is not a defense; (4) expand the scope of individual liability to include supervisors who knowingly expose their workers to unsafe conditions; and (5) provide resources to investigate and prosecute criminal violations of the OSH Act effectively.<sup>28</sup>

#### A. FELONIES AND ENHANCED PENALTIES

Criminal violations of the OSH Act should be felonies. It is a felony to commit most criminal violations of environmental laws, hazardous materials transportation laws, and many wildlife protection laws. Insider trading, customs violations, tax crimes, antitrust violations, food and drug violations, and transportation of stolen vehicles are felonies. False statements, mail and wire fraud, obstruction of justice, perjury, false declarations, and conspiracy in violation of Title 18 are all felonies. The list goes on, but the point is simple: when criminal worker safety violations occur, they too should be eligible for felony prosecution.

Upgrading OSH Act violations to felony status is also essential for meaningful criminal enforcement to occur. From 2003 to 2008, only ten criminal cases were brought for violations of the OSH Act, despite the fact that OSHA conducted 9,838 fatality investigations during that time period,<sup>29</sup> and thousands of workers died on the job each year. Absent action by Congress, criminal cases will remain infrequent, because federal prosecutors will not devote significant resources to cases that Congress relegates to misdemeanor status. Prosecutors occasionally will accept plea agreements

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<sup>28</sup> Senator Edward M. Kennedy has introduced the Protecting America's Workers Act of 2007, S. 1244, 110th Cong. (2007), which would be a substantial improvement over existing law. First, the Protecting America's Workers Act makes most criminal violations of the OSH Act felonies and would increase the maximum penalty for a willful violation of the worker safety laws that results in death from six months to ten years (and from one year to 20 years in the event of a second conviction for the same offense). Second, the Protecting America's Workers Act expands the criminal provisions to reach violations that cause serious bodily injury but not death. The Protecting America's Workers Act could be strengthened if it addressed knowing endangerment, mental state requirements, individual liability, and law enforcement resources, but the legislation appears likely to suffer the same fate as similar bills introduced by Senator Kennedy during the 108th Congress and the 109th Congress, which never received a vote at the committee level.

<sup>29</sup> MAJORITY STAFF REPORT, *supra* note 23, 10.

to lesser included misdemeanor charges, but they rarely will initiate complex prosecutions if the most serious, readily provable offense is a misdemeanor.

Enhanced penalties also are necessary to ensure adequate punishment for criminal violations of the OSH Act and to provide meaningful deterrence against future violations. When a worker dies because of a knowing violation of the worker safety laws (or, as argued below, is seriously injured or knowingly endangered) the maximum sentence should be measured in years, not months. Anything less sends the wrong message about the value of a worker's life. The environmental laws carry maximum penalties of three to five years per substantive count—and 15 years for crimes involving knowing endangerment (regardless of whether any injury occurs). The OSH Act should be amended to provide similar penalties for worker safety crime.

## B. SERIOUS BODILY INJURY AND KNOWING ENDANGERMENT

The criminal provisions of the OSH Act should be expanded to reach violations that cause serious bodily injury but not death. Serious bodily injury includes injuries that involve a substantial risk of death, or protracted unconsciousness, protracted and obvious physical disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.<sup>30</sup> Given the devastation and suffering that can result from serious injuries, criminal prosecution under the OSH Act should be possible even in cases where death does not occur.

The Elias case is a classic example of a situation where death did not occur but a criminal prosecution under the OSH Act should have been possible. The fact that the emergency room doctors were able to save Dominguez's life had no bearing on the extent to which Elias violated the worker safety laws or his mental state when he committed those violations. While the fact that a worker dies may be relevant to the sentence that is imposed, it should have no effect on whether a criminal violation has occurred.

In addition, the OSH Act would promote worker safety more effectively if it were expanded to cover violations that endanger workers. As noted above, there is no difference in the nature of the violation committed by a defendant or the defendant's mental state if a particular outcome occurs, whether that outcome is death, serious bodily injury, or the intervention of some good fortune that prevents any harm. Criminal culpability should be determined based on the risk associated with a defendant's misconduct and the degree to which the defendant is aware of that risk, not whether the risk becomes a reality.

The environmental laws again are instructive, since they make knowing endangerment a crime whenever a defendant commits a Clean Water Act, RCRA, or Clean Air Act violation and "knows at the time that he [or she] thereby places another person in imminent danger of death or serious bodily injury."<sup>31</sup> If a similar provision were added to the OSH Act, the law would do more to prevent violations that put American workers at risk of death or serious bodily injury.

## C. MENTAL STATE REQUIREMENTS

The OSH Act also would provide greater protection for workers if the Act criminalized "knowing" violations of the worker safety laws that caused death or serious

<sup>30</sup> See, e.g., 33 U.S.C. § (c)(3)(B)(iv) (Clean Water Act definition of "serious bodily injury"); 42 U.S.C. § 6928(f)(6) (RCRA definition); 42 U.S.C. § 7413(c)(5)(F) (Clean Air Act definition).

<sup>31</sup> 33 U.S.C. § 1319(c)(3)(A) (the Clean Water Act); 42 U.S.C. § 6928(e) (RCRA); and 42 U.S.C. § 7413(c)(5)(A) (the Clean Air Act). The Clean Air Act also contains a negligent endangerment provision. 42 U.S.C. § 7413(c)(4).

bodily injury or endangered workers. Most federal environmental crimes and most federal regulatory crimes address knowing violations of the law, which require that the defendants knowingly engage in the conduct that is proscribed. In other words, knowledge of the facts is required (e.g., that a confined space entry is occurring without appropriate testing and/or safety equipment), but knowledge of the law is not (e.g., that OSHA rules require appropriate testing and/or safety equipment).<sup>32</sup>

The problem with the current version of the OSH Act is that it is limited to “willful” violations. The use of willfulness places the worker safety laws outside the mainstream of federal criminal law and makes ignorance of the law a defense. It is a long-standing principle of American jurisprudence that ignorance of the law is not a defense,<sup>33</sup> and ignorance of the law should not be a defense where the health and safety of America’s workers are involved. Employers who are covered by the OSH Act have a duty to know the law. Employers should not be able to escape criminal liability for knowing violations that harm workers or place workers at risk by claiming that they did not know what safety measures were required.

#### D. INDIVIDUAL LIABILITY

The scope of individual liability for criminal violations of the OSH Act should be clarified to promote greater compliance and provide better deterrence. As noted above, individual liability plays a central role in any criminal enforcement scheme, since the threat of jail time is arguably the single greatest deterrent provided by criminal law. Unfortunately, the current version of the OSH Act applies only to “employers,” which are defined under the Act as “a person engaged in a business affecting commerce who has employees. . . .”<sup>34</sup> The OSH Act’s definition of employers may absolve most mid-level managers of criminal responsibility, even though they often have the greatest first-hand knowledge of worker safety violations and supervise the conduct or conditions that constitute violations.<sup>35</sup>

A better approach to individual liability would be to allow criminal prosecution of the corporate officials who are responsible for the violations, which can occur in two ways. First, all corporate officials who are directly involved or order that misconduct occur should be criminally liable, which is standard in federal criminal cases. Second, corporate officials who (1) know that the conduct is occurring; (2) have the authority to prevent the conduct from occurring; and (3) fail to prevent the conduct should be held responsible under the “responsible corporate officer” doctrine. The scope of the doctrine extends beyond individuals with corporate titles to include all corporate officials who meet the three elements of the doctrine. The responsible corporate officer doctrine also is widely used in federal criminal prosecutions, including cases under the environmental laws.<sup>36</sup>

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<sup>32</sup> *Bryan v. United States*, 524 U.S. 184, 191-199 (1998) (knowing violations require “proof of knowledge of the facts that constitute the offense” whereas willful violations require proof “that the defendant acted with knowledge that his conduct was unlawful”) (internal quotation marks omitted).

<sup>33</sup> *United States v. International Minerals and Chem. Corp.*, 402 U.S. 558, 563 (1971).

<sup>34</sup> 29 U.S.C. § 652(5).

<sup>35</sup> See Rhinehart, *supra* note 17, at 358 n.38 (citing cases); see also Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 753, 781-82 (1987).

<sup>36</sup> The “responsible corporate officer” doctrine originated in a Supreme Court case interpreting the Federal Food, Drug, and Cosmetic Act. *United States v. Dotterweich*, 320 U.S. 277 (1943). Its use in the environmental crimes context has been considered by a number of courts, most notably in *United States v. Iverson*, 162 F.3d 1015, 1022-25 (9th Cir. 1998).

#### E. LAW ENFORCEMENT RESOURCES

A final issue with the criminal provisions of the OSH Act is the need for law enforcement resources to investigate and prosecute worker safety crimes. Most OSHA compliance officers do an excellent job investigating worker safety violations. They are not criminal investigators, however, and Fourth Amendment concerns would be raised if they obtained evidence for purposes of a criminal investigation. Moreover, once a criminal investigation begins, witnesses must be interviewed, evidence reviewed, subpoenas issued, and, in some cases, search warrants executed, all of which must be done by law enforcement officials.

During the Justice Department's worker endangerment initiative, criminal investigators from the EPA and prosecutors from the Department's Environmental Crimes Section handled the cases. In cases that are not environmental crimes, however, other investigators and prosecutors would be necessary. Prosecutorial resources could be provided by United States Attorney's Offices, although they have significant demands on their budgets and may not have the expertise to handle worker safety prosecutions. It may be appropriate to create a new office, most likely within the Criminal Division of the Justice Department, which would specialize in the prosecution of worker safety crimes.

Similarly, investigative resources could be provided by the Federal Bureau of Investigation ("FBI"), which has the investigative expertise and geographical coverage to assist in worker endangerment cases. Historically, the FBI has provided significant support for the environmental crimes program and other law enforcement programs involving regulatory crime. Today, however, the FBI has limited resources for crimes other than counterterrorism. It therefore may be necessary to create a criminal investigation division within OSHA and hire criminal investigators, with full law enforcement training and authority, to investigate worker safety crimes. While resource issues take time and political will to address, an effective criminal enforcement program under the OSH Act will require sufficient investigative and prosecutorial resources.

#### IV. CONCLUSION

The criminal provisions of the environmental laws and the OSH Act were enacted during the 1970's, when much of the modern regulatory state was created. Within a decade, Congress had changed the environmental laws—the violations of which also began as misdemeanors—because federal prosecution resources generally are reserved for felony cases and Congress recognized that the benefits of a strong environmental crimes program would be lost without felonies.

It has been 20 years since Congress amended the environmental laws, and it is long past time for Congress to take the same approach to our worker safety laws. Some workers do not have choices about where they work, either because jobs are scarce or because they have not had the educational opportunities that would enable them to seek higher-paying and safer jobs. But everyone deserves a safe place to work and the ability to come home to their families in good health each night.

We can do more to protect workers and ensure that all companies in the United States honor our best traditions of caring for and protecting workers. By strengthening the criminal provisions of the worker safety laws, Congress can make good on the promise of a safe workplace made 30 years ago when Congress enacted the Occupational Safety and Health Act.